

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

KERRY CRUSOE,

Defendant and Appellant.

B287521

(Los Angeles County
Super. Ct. No. TA143283)

APPEAL from a judgment of the Superior Court of Los Angeles County, Pat Connolly, Judge. Remanded for resentencing.

John F. Schuck, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Zee Rodriguez and Paul S. Thies, Deputy Attorneys General, for Plaintiff and Respondent.

Kerry Crusoe, convicted of shooting at an occupied motor vehicle (Pen. Code,¹ § 246), attempted murder (§§ 187/664), and assault with a firearm (§ 245, subd. (a)(2)), contends on appeal that the trial court abused its discretion when it failed to strike his prior strike offenses; that his prior convictions should have been stricken by the trial court rather than stayed; and that he is entitled to a remand for resentencing in light of recent amendments to sections 667 and 1385. We remand the matter for resentencing.

FACTUAL AND PROCEDURAL BACKGROUND

In the months after Scorwin Gammage accidentally damaged Crusoe's car, Crusoe retaliated against Gammage on multiple occasions, culminating in an incident in which he fired five shots into Gammage's car while Gammage and his girlfriend were inside the vehicle.

Crusoe was charged with shooting at an occupied motor vehicle, the attempted premeditated murder of Gammage, and assault with a firearm on Gammage's girlfriend.² With respect to the attempted murder and shooting at an occupied motor vehicle charges, Crusoe was alleged to have personally and intentionally discharged a firearm within the meaning of section 12022.53, subdivision (c); he was also alleged to have personally used a

¹ Unless otherwise indicated, all further statutory references are to the Penal Code.

² Originally Crusoe was charged with the attempted murder of Gammage's girlfriend, but during trial, the People elected not to proceed on that charge and amended the information to include the charge of assault with a firearm.

firearm within the meaning of section 12022.5, subdivision (a) when committing the assault with a firearm. Crusoe was alleged to have suffered two prior strike convictions within the meaning of the “Three Strikes” law (§§ 667, subds. (b)-(j), 1170.12, subds. (a)-(d)) and two prior serious felony convictions within the meaning of section 667, subdivision (a)(1); and to have served six prior prison terms pursuant to section 667.5, subdivision (b).

Crusoe was convicted of all three offenses, and the jury found true the firearm enhancement allegations. Because the jury was unable to reach a verdict on the allegation that the attempted murder was willful, deliberate, and premeditated, the court declared a mistrial as to that allegation. Crusoe admitted the prior conviction allegations.

The prosecutor recommended that the trial court impose the maximum possible sentence of 96 years to life because Crusoe’s prior strikes, though old, were violent; Crusoe had spent the majority of his adult life in prison; the offense was a planned revenge; Crusoe shot at Gammage and his girlfriend when they were vulnerable; he fired multiple times; he prevented Gammage and his girlfriend from escaping the gunfire; and he placed Gammage in extreme danger.

Crusoe’s counsel requested the minimum sentence of 15 years. He argued that the strikes were “very old, so the court clearly can justify striking the strikes.” He questioned the truth of the prosecutor’s statement that he had spent most of his adult life in prison, noting that Crusoe’s most recent offenses were drug-related and nonviolent. He argued that prior physical conflict between Crusoe and Gammage was “mitigation to a certain extent” because Crusoe was smaller than Gammage. He observed that Gammage was uninjured by the gunfire. He

pointed out that the jury had not found true the allegation that the attempted murder was willful, deliberated, and premeditated, meaning that the aggravating factor of planning and sophistication had not been proven. “Finally,” Crusoe’s counsel argued, “and . . . most emotionally important to me, I have been consistently impressed by the level of very strong ties that Mr. Crusoe has kept with his family. And I say that partially because of the sympathies that might go out to the family and also to Mr. Crusoe, but also that it shows that this is not a person that does not have redeeming qualities; he certainly does.”

The prosecutor agreed that Crusoe and his mother had a strong bond, and observed that Crusoe’s mother “has been nothing but an absolute pleasure to deal with.” But, she argued, “I think it’s incredibly selfish of the defendant, that he chose to arm himself with a gun and try to kill someone, knowing that he is his mother’s only living child. He’s the one who supported her, and he took that risk, and he needs to pay the consequences for that risk.”

The court agreed with Crusoe’s attorney that the premeditation argued by the People had not been proven to the jury, as the jury did not find true the premeditation allegation. However, the court found that there were multiple victims, and that they were particularly vulnerable; and that Crusoe seriously endangered not only the victims in their car but everyone in the vicinity. The court observed that when he committed the offense, “Mr. Crusoe did not think of his mother. . . . And I’m going to tell you quite candidly, Mr. Crusoe, in sentencing you, I have very little empathy or sympathy for you, it’s only for your mother that I have anything. I think that your actions throughout your life have proven that you only care about one person, and one person

only, and that's yourself. [¶] I think that if you did truly care about your family that cares about you, specifically for your mother, you wouldn't engage in the acts that you do."

As to the priors, the court said, "[T]he simple fact of the matter is you've never stayed free of custody, you have maintained a long history of violating the law. The two from, truly, over 30 years ago, are crimes of violence. So I don't necessarily agree that his crimes are moving upwards. I think he started off hot and he has maintained that. [¶] So because of that, the court is not striking the strikes."

The court sentenced Crusoe to an aggregate term of 73 years to life in state prison, calculated as follows: For the attempted murder, the court sentenced Crusoe to 25 years to life in state prison, plus a consecutive 10 years for his two prior convictions under section 667, subdivision (a)(1), and an additional 20 years for the personal and intentional discharge of a firearm, for a total term of 55 years to life.

For the assault with a deadly weapon conviction, the court rejected the People's recommendation of a consecutive sentence of 25 years to life. The court struck one of Crusoe's prior strikes for the purposes of this count, then imposed the high term of four years, consecutive, doubled pursuant to the Three Strikes law. The court imposed a consecutive high term of 10 years for Crusoe's personal use of a firearm under section 12022.5, subdivision (a), leading to a total sentence of 18 years.

Finally, for shooting into an occupied vehicle, the court struck both of Crusoe's prior strikes. The court imposed and stayed the high term of seven years, and it also stayed the firearm enhancement associated with this offense pursuant to section 654.

For all offenses, the court stayed the prior prison term enhancements under section 667.5, subdivision (b). Crusoe appeals.

DISCUSSION

I. Crusoe's Sentence

Crusoe contends that the trial court abused its discretion when it sentenced him to 73 years to life in prison. He argues that because he is 55 years old and ineligible for parole for 62 years, the sentence amounts to life in prison without the possibility of parole. He describes his sentence as draconian and unnecessarily long, and observes that the trial court could have imposed a lesser sentence if it had stricken the firearm use findings or his prior strikes. He argues that his prior strikes should have been stricken because they were remote; notes that, while the offense was serious, no one was injured; and asserts that “the facts of the instant case, appellant’s record, and the probation report” do not justify the sentence imposed by the trial court here. “A non-strikes or a two-strikes sentence would more than suffice” as punishment, Crusoe contends.

We review both the court’s decision whether to strike prior strikes and the exercise of its sentencing discretion as a whole for an abuse of discretion. (*People v. Williams* (1998) 17 Cal.4th 148, 162 (*Williams*); *People v. Carmony* (2004) 33 Cal.4th 367, 376-377 (*Carmony*).) We find no abuse of discretion here.

“[I]n ruling whether to strike or vacate a prior serious and/or violent felony conviction allegation or finding under the Three Strikes law, on its own motion, ‘in furtherance of justice’ pursuant to Penal Code section 1385(a), or in reviewing such a ruling, the court in question must consider whether, in light of the nature and circumstances of his present felonies and prior

serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*Williams, supra*, 17 Cal.4th at p. 161.)

The record shows that the trial court was aware of its discretion under section 1385, subdivision (a), and considered the relevant factors, including the arguments presented by Crusoe, but ultimately determined that striking the prior offenses in full would not be consistent with the spirit of the Three Strikes law. Instead, the court elected to sentence Crusoe as a third-strike offender for one count, as a second-strike offender on the second count, and to dismiss the prior strikes completely on the third count. Examining Crusoe's present offense and his past offenses, his background, his character, and his prospects, we cannot say the court abused its discretion when it declined to completely strike his prior strikes. Given Crusoe's extensive criminal history, and his conduct in the instant offense of shooting at multiple vulnerable victims and endangering the public, it was not unreasonable for the trial court to conclude that he was not in fact outside the spirit of the Three Strikes scheme.

"The trial court's sentencing discretion must be exercised in a manner that is not arbitrary and capricious, that is consistent with the letter and spirit of the law, and that is based upon an 'individualized consideration of the offense, the offender, and the public interest.' [Citation.]" (*People v. Sandoval* (2007) 41 Cal.4th 825, 847.) Here, the court identified several aggravating factors supporting its decision to impose high term sentences: the crime involved multiple victims, the victims were particularly

vulnerable, and Crusoe had a lengthy criminal history. (See Cal. Rules of Court, rule 4.421.) A single aggravating factor is sufficient for a trial court to impose a high term sentence. (*People v. Black* (2007) 41 Cal.4th 799, 817.) On appeal, we may not substitute our judgment of the relative weights of aggravating and mitigating factors properly considered by the trial court in imposing sentence. (*People v. Zichwic* (2001) 94 Cal.App.4th 944, 961.) In the absence of a showing that a sentencing decision was irrational or arbitrary, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on appellate review. (*Carmony*, 33 Cal.4th at pp. 376-377.)

II. Section 667, Subdivision (a)(1)

At the time Crusoe was sentenced, the court was required under section 667, subdivision (a), to enhance the sentence imposed for conviction of a serious felony by five years for each qualifying prior serious felony conviction. On September 30, 2018, the Governor signed Senate Bill No. 1393, which, effective January 1, 2019, allows the trial court to exercise discretion to strike or dismiss section 667, subdivision (a), serious felony enhancements “in the furtherance of justice.” (See Stats. 2018, ch. 1013, §§ 1 & 2.)

Crusoe and the Attorney General agree, as do we, that the new legislation applies retroactively to Crusoe and other defendants whose sentences were not final before January 1, 2019. (See *People v. Garcia* (2018) 28 Cal.App.5th 961, 973 [“it is appropriate to infer, as a matter of statutory construction, that the Legislature intended Senate Bill 1393 to apply to all cases to which it could constitutionally be applied, that is, to all cases not yet final when Senate Bill 1393 becomes effective on January 1,

2019”]; accord, *People v. Johnson* (2019) 32 Cal.App.5th 26, 68; see generally *In re Estrada* (1965) 63 Cal.2d 740, 745.) However, the parties disagree on whether remand is appropriate.

The Attorney General argues that it would be futile to remand to allow the trial court to determine whether to strike the enhancements previously imposed under section 667, subdivision (a)(1) because the court clearly indicated that it would not have dismissed the enhancements even if it had discretion to do so. (See *People v. Garcia, supra*, 28 Cal.App.5th at p. 973, fn. 3 [remanding for resentencing when “the record does not indicate that the court would not have dismissed or stricken defendant's prior serious felony conviction for sentencing purposes, had the court had the discretion to do so at the time it originally sentenced defendant”].) We disagree. The court’s statements at sentencing did not express an intention to impose the maximum possible sentence, and the sentence itself indicates that the court did not believe the maximum available sentence was appropriate. The court did not make any statements indicating that it would not exercise discretion to strike the enhancements even if it had discretion to do so. Moreover, defendants are entitled to sentencing decisions made in the exercise of the informed discretion of the sentencing court, and a court which is unaware of the scope of its discretionary powers can no more exercise that informed discretion than one whose sentence is or may have been based on misinformation regarding a material aspect of a defendant’s record. (*People v. Billingsley* (2018) 22 Cal.App.5th 1076, 1081.) Senate Bill No. 1393 has granted trial courts discretion to strike the section 667, subdivision (a)(1) enhancement in the interest of justice. Because the trial court

sentenced Crusoe without the benefit of being able to exercise this discretion, remand for resentencing is appropriate.

We note that although the People alleged enhancements under section 667, subdivision (a)(1) for all counts, the court imposed this enhancement only as to the attempted murder conviction. On remand, the trial court must exercise its discretion concerning the section 667, subdivision (a)(1) enhancement with respect to each count on which Crusoe was convicted.

III. Section 667.5, Subdivision (b)

Crusoe asserts that the trial court erred when it stayed, rather than striking, the one-year sentence enhancements under section 667.5, subdivision (b) for his prior prison terms. The Attorney General agrees with Crusoe as to four of the six prior prison term enhancements, but argues that the trial court properly stayed the enhancements for the two prior prison terms that were served for the prior offenses that also provided the basis for the section 667, subdivision (a)(1) serious felony enhancements.

For the same prior offense, the trial court cannot impose both the five-year enhancement for a prior serious felony conviction under section 667, subdivision (a), and the one-year enhancement for a prior prison term under section 667.5, subdivision (b). (*People v. Jones* (1993) 5 Cal.4th 1142, 1149-1153.) The greater enhancement must be imposed (*ibid.*), and the lesser enhancement stayed (*People v. Brewer* (2014) 225 Cal.App.4th 98, 105-106 [where more than one enhancement cannot be imposed for the same prior prison term, the lesser enhancement(s) must be stayed].) However, if the prison term is attributable to a felony for which no prior serious felony

enhancement is imposed, the section 667.5, subdivision (b), enhancement for that prison term must be imposed or stricken. (*People v. Langston* (2004) 33 Cal.4th 1237, 1241 [“[o]nce the prior prison term is found true within the meaning of section 667.5(b), the trial court may not stay the one-year enhancement, which is mandatory unless stricken”]; see *Brewer*, at p. 104 [“[t]he trial court has no authority to stay an enhancement, rather than strike it . . . when the only basis for doing either is its own discretionary sense of justice”]; Cal. Rules of Court, rule 4.447(b) [while a court may strike an enhancement, it may not stay an enhancement unless an unlawful sentence results].)

On remand, therefore, the trial court must stay the section 667.5, subdivision (b) prior prison term enhancements for any prior prison terms served for convictions for which a prior serious felony enhancement is imposed under section 667, subdivision (a); and it must either impose or strike those section 667.5, subdivision (b) enhancements that are attributable to felonies for which no prior serious felony enhancement is imposed under section 667, subdivision (a)(1).

DISPOSITION

We remand the matter for resentencing. In all other respects, the judgment is affirmed.

ZELON, J.

We concur:

PERLUSS, P. J.

SEGAL, J.